Supreme Court, U.S.
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No. 99-648

In The

Supreme Court of the United States

WYSONGA McGLOTHLIN,

Petitioner,

v.

JAMES R. CULLINGTON, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRED E. DAVIS
Attorney of Record
for Respondent
DAVIS & DAVIS, P.C.
9442 Capital of Texas Highway
Arboretum Plaza I, Suite 950
Austin, Texas 78759
Telephone: (512) 343-6248
Facsimile: (512) 343-0121

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The questions here presented are as follows:

I. Since the Texas Court of Appeals, Third District, did not decide the case on constitutional grounds, but rather on an evidentiary failure by Petitioner, does this court have jurisdiction for review by Writ of Certiorari?

II. Does the Texas Medical Liability and Insurance Improvement Act, which imposes either an expert report, cash or bond prerequisite at the initial stage of medical malpractice litigation, violate the Fourteenth Amendment of the United States Constitution?

LIST OF PARTIES

The Petition accurately lists the parties to the proceeding:

1. Petitioner: Wysonga McGlothlin
2. Respondent: James R. Cullington, M.D.

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OPINIONS BELOW

The opinions of the Texas Courts are contained in the Petition for Writ of Certiorari as follows:

Texas District Court, 345th District (Pet. at A-14).

Texas Court of Appeals, Third District (Pet. at A-1 – A-13).

Supreme Court of Texas (Pet. at A-27).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257 (West 1993). Because the case was not decided on constitutional grounds, but rather on an evidentiary failure by Petitioner, jurisdiction is lacking.

STATUTES OR CONSTITUTIONAL PROVISIONS INVOLVED

The expert report, cash or bond requirements of section 13.01 of Article 4590i, Texas Revised Civil Statutes, were at issue in the Texas Courts and are found in the Petition. (Pet. at A-28 – A-34).

Petitioner asserts that the dismissal of her claim violates the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner's case alleging personal injury from perceived medical negligence was dismissed pursuant to provisions of the Texas Medical Liability and Insurance Improvement Act ("the Act"). TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01 (West Supp. 1999). Petitioner failed to post the requisite bond, cash or expert report and upon motion, the trial court increased the bond requirements in accordance with the Act. When Petitioner failed to comply with the increased bond requirement, the trial court dismissed Petitioner's lawsuit as mandatorily directed by the Act.

No evidentiary hearing was ever requested, nor was any legally competent evidence ever introduced by Petitioner. The Texas Court of Appeals, Third District, affirmed the dismissal of Petitioner's medical negligence claim against Dr. Cullington because Petitioner had failed to comply with the Act and because the record failed to reflect any evidence of Ms. McGlothlin's actual financial inability to comply with the requirements of section 13.01. In essence, she had failed to meet her evidentiary requirements.[1] The Texas Supreme Court denied Petitioner's Petition for Review on July 15, 1999.

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[1] As noted in the opinion of the Texas Court of Appeals, Third District, Ms. McGlothlin's affidavit contained a hearsay reference attributable to her attorney that experts require a $2,000.00 retainer, but this hearsay is no evidence that a $2,000.00 threshold actually exists or that she ever attempted to comply with the statute. (Pet. at A-11).

Respondent will confine this Brief in Opposition to the granting of the Petition for Writ of Certiorari to two issues:

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257 (West 1993); and
2. Whether the expert report, cash or bond prerequisites imposed by the Act are violative of Fourteenth Amendment rights of due process.

ARGUMENT
REASONS FOR DENYING THE WRIT

A. Jurisdiction is lacking for review by Writ of Certiorari.

Petitioner has erroneously characterized the opinion of the Texas Court of Appeals, Third District, and has resultingly misstated this Court's jurisdiction. Petitioner represents that the Texas Court of Appeals, Third District, upheld the dismissal merely on presumptive constitutional validity (Pet. at 5). Instead, the Texas Court of Appeals, Third District, explicitly stated that it would not conduct an analysis of the constitutionality of the Act "because Mrs. McGlothlin has failed to provide sufficient evidence that these requirements actually acted to keep her from pursuing her claim, as was her burden." (Pet. at A-11). Thus, any statements by the Texas Court of Appeals, Third District, regarding the constitutionality of the statute were merely dicta.

Since the Texas Court of Appeals, Third District, did not make a decision on the constitutional validity of the

statute, the jurisdiction of this Court under section 1257 is not invoked. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809) long ago held that the Judiciary Act of 1789, c. 20 § 25, 1 Stat. 85, vests this Court with no jurisdiction unless a federal question was decided in the state court below. Petitioner's evidentiary failure and the resulting dismissal of her lawsuit simply does not bring forward a decision presenting a federal question.

B. The provisions of the Act do not violate the Fourteenth Amendment.

Petitioner relies upon *Lindsey v. Normet*, 405 U.S. 56 (1972) as an example of a state statute imposing unconstitutional limitations upon litigants' access to the courts by placing an onerous financial condition on their right to appeal. (Pet. at 9). The facts, circumstances and statutory restrictions of the *Lindsey* case and the case at hand are, however, markedly different, making *Lindsey* inapplicable to the present case. Specifically:

1. The *Lindsey* court found no evidence of a reasonable relationship between the Oregon bond under review and expenses. *Lindsey*, 405 U.S. at 77. The bond requirement in the matter now before this Court was determined by the Texas Legislature as having a reasonable relationship to expenses. See, *Odak v. Arlington Memorial Hosp.*, 934 S.W.2d 868, 872 (Tex. App. – Fort Worth 1996, writ denied).

2. The *Lindsey* court held that a bond required for a plaintiff for an amount equal to reasonable expenses was **not** unconstitutional. *Lindsey*, 405 U.S. at 79 n.26. As noted above,

the Texas Legislature determined that the bond requirement at issue has a reasonable relationship to expenses. Accordingly, under the *Lindsey* analysis, the statutory provision in question would survive a constitutional challenge.

3. Unlike the Oregon statute held unconstitutional in *Lindsey*, the Texas statutory provision in this case has an *in forma pauperis* provision which allows a claimant to file an affidavit in lieu of security for costs. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(o). The Texas Act would also allow a Plaintiff to file a readily ascertainable expert report in lieu of a bond. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a)(3).

4. The Texas Act contemplates the usual manner in which medical negligence cases are handled. Specifically, section 13.01(o) allows an affidavit of inability to pay costs to those litigants who are "proceeding without an attorney" and who are unable to afford the cost bond or cash requirements. TEX. REV. CIV. STAT. ANN. art. 4590i § 13.01(o). The Act therefore contemplates the normal scenario where such cases are taken by attorneys on contingent fee contracts under which, in exchange for a percentage of the recovery (usually 40%), the attorney not only assumes the duties of prosecuting the client's claim but also advances the costs of the litigation, which is then recovered out of the final settlement or trial proceeds. While there is no evidence in the record of this case as to what Petitioner's contractual relationship is with her attorney, the record is also void of any

evidence regarding Petitioner's attorney's ability to meet the expert report, cash or bond requirements or of his efforts to do so on his client's behalf.[2]

5. Petitioner Wysonga McGlothlin is not proceeding herein, nor did she appear in the Texas Courts *in forma pauperis*! She merely failed in the Texas Courts to present any credible evidence on the financial implications, if any, of meeting the statutory requirements.

CONCLUSION

The Texas Court of Appeals, Third District, did not decide this case on constitutional grounds, but rather on a failure on the part of Petitioner to meet her evidentiary burden; thus there is no jurisdiction with this Court pursuant to 28 U.S.C. § 1257. Should, however, the constitutionality of Texas statute be evaluated, there are numerous distinctions from the facts, circumstances and

[2] In its opinion, the Texas Court of Appeals, Third District, referenced *Odak v. Arlington Memorial Hosp.*, 934 S.W.2d 868 (Tex.App. – Fort Worth 1996, writ denied). (See also Pet. A-9). In *Odak*, the court stated "if the expense of obtaining an expert report is too prohibitive for both the Claimant **and the attorney**, they will be unable to pursue a claim requiring expert testimony regardless of whether they file the affidavit." *Odak*, 934 S.W.2d at 872 (emphasis added). When compared to section 13.01(o) for litigants "proceeding without an attorney", there is recognition of the fact that litigants with attorneys have additional resources available to meet the statutory requirements.

limitations imposed in *Lindsey v. Normet*, making the Court's holding therein inapplicable.

For the reasons set forth above, the Respondent submits that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

FRED E. DAVIS
Attorney of Record
for Respondent
DAVIS & DAVIS, P.C.
9442 Capital of Texas Highway
Arboretum Plaza I, Suite 950
Austin, Texas 78759
Telephone: (512) 343-6248
Facsimile: (512) 343-0121